LP Enterprises and International Brotherhood of Electrical Workers, Local 532. Case 27–CA– 11496

July 28, 1994

DECISION AND ORDER

By Members Stephens, Devaney, and Browning

On September 24, 1992, Administrative Law Judge Michael D. Stevenson issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed a brief in response to the Respondent's exceptions. The Charging Party filed cross-exceptions and a brief in support thereof and in opposition to the Respondent's exceptions. The Respondent filed a brief in reply to the Charging Party's brief and a brief in reply to the General Counsel's brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, 1 cross-exceptions, and briefs and has decided to affirm the judge's rulings, 2 findings, and conclusions and to adopt the recommended Order, except that the attached notice is substituted for that of the administrative law judge.

On June 13, 1990, the Union's assistant business manager, Donald Burke, filed an unfair labor practice charge alleging that the Respondent failed to hire him and three other union applicants for electrician positions at the Respondent's smelter project due to their union affiliation. Following an investigation, the Board's Regional Office found the charge to be without merit and offered Burke the choice of withdrawing the charge or having it dismissed. Burke withdrew the charge.

The Respondent thereafter filed a lawsuit in Montana state court against the Union and its Assistant Business Manager Burke,³ alleging that under Montana state law the Union and Burke had engaged in malicious prosecution of the Respondent by filing an unfair labor practice charge against the Respondent which the

Union knew was false. The judge found that the Respondent violated Section 8(a)(1) and (4) of the Act by initiating and maintaining the state court lawsuit against the Union and Burke. We agree with the judge's finding for the reasons stated in his decision and for the reasons set forth below.

It is well established that the Board may not enjoin the prosecution of a state court lawsuit as an unfair labor practice unless the General Counsel establishes that the lawsuit lacks a reasonable basis in fact or law and that the lawsuit was filed with a retaliatory motive. *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 748–749 (1983).

The judge found that the Respondent's state court malicious prosecution action lacked a reasonable basis. The judge explained that Board law holds that the filing of an unfair labor practice charge is conduct protected by the National Labor Relations Act unless the charge was undertaken in bad faith. See Summitville Tiles, 300 NLRB 64, 65 fn. 5 (1990). The judge accordingly reasoned that, in order to establish a reasonable basis for the Respondent's state court malicious prosecution lawsuit, it was necessary to show that Burke filed the charge on behalf of the Union in bad faith. The judge reviewed the Respondent's evidence in support of its state court lawsuit and found that the evidence failed to establish that the charge was filed in bad faith. Accordingly, the judge concluded that the state court lawsuit lacked a reasonable basis.

The Respondent argues in its exceptions that the judge, in determining whether the state court lawsuit had a reasonable basis, should have reviewed the evidence in support of its state court lawsuit solely under Montana state law of malicious prosecution and should not have required the Respondent to establish bad faith. We find that the judge properly concluded that the Respondent's state court malicious prosecution claim is not governed entirely by Montana state law. Rather, because the Respondent's state court lawsuit is targeted at the filing of an unfair labor practice charge with the Board, Federal labor law superimposes the requirement of bad faith. See Linn v. Plant Guard Workers, 383 U.S. 53, 64-65 (1966). In other words, in order for the filing of a charge to lose the protection of the Act and be subject to a malicious prosecution action, the Federal standard requires a showing that the party filing the charge acted maliciously, i.e., it filed an unfair labor practice charge with knowledge that the charge allegations were false or with reckless disregard of the truth.

We have carefully reviewed the evidence submitted by the General Counsel and the Respondent regarding the circumstances surrounding the filing of the unfair labor practice charge by Burke on behalf of the Union. We agree with the judge's finding based on his review of the record evidence that Burke reasonably believed

¹We deny the Respondent's motion to strike the Charging Party's cross-exceptions and portions of the Charging Party's brief in support thereof. Contrary to the Respondent's contention, the Charging Party's cross-exceptions were timely filed pursuant to Sec. 102.46(e) of the Board's Rules and Regulations.

²The Respondent asserts in its exceptions that the judge made certain remarks at trial which establish that the judge "prejudged" this case. We have carefully reviewed the judge's remarks and find that they fail to establish any bias by the judge in his disposition of this

³Contrary to the Respondent's exceptions, the judge correctly found full-time paid union employee Donald Burke to be a statutory employee under Sec. 2(3) of the Act. *Sunland Construction Co.*, 309 NLRB 1224 (1992).

that he was not hired by the Respondent as an electrician due to his union affiliation,⁴ and we accordingly find that Burke filed the charge in good faith. Having shown that the charge was filed in good faith, the General Counsel carried his burden of establishing that the state court lawsuit lacked a reasonable basis.

We further agree with the judge's conclusion that the evidence submitted by the Respondent failed to raise a genuine issue of material fact.⁵ The Respondent contends in its exceptions that even assuming the judge's conclusions are supportable on the record evidence, those conclusions are flawed because the judge erroneously precluded the Respondent from submitting evidence concerning charges filed by the Union in eight or nine other Board cases that, the Respondent urges, would support its claim that the Union's unfair labor practice charge in this case was filed in bad faith. We find no merit in this contention. We have reviewed the offer of proof that the Respondent made in the light most favorable to the Respondent, and we find that it fails to raise a genuine factual issue that the charge in question here was filed in bad faith. The Respondent's proffer—simply that other charges filed by Burke have been withdrawn or dismissed—does not suggest that those charges were filed by Burke in bad faith. Charges before the Board are commonly withdrawn or dismissed, and such disposition is not tantamount to a finding that the charges have been filed in bad faith.6 Because the Respondent did not offer to prove that Burke knew that there was no basis for those charges at the time he filed them (or that he acted with reckless disregard of the truth), the excluded evidence is not probative as to whether the charge in issue here was filed in bad faith.

We have likewise fully reviewed evidence which the Respondent argues in its exceptions was not considered by the judge and which, it argues, establishes that the instant charge was filed in bad faith and accordingly that its state court lawsuit had a reasonable basis.7 Viewing the Respondent's evidence as a whole and in the light most favorable to the Respondent, as did the judge, we reject the Respondent's argument. This evidence falls far short of raising a genuine factual issue as to whether the Union filed its unfair labor practice charge with knowledge that the charge allegations were false or with reckless disregard of the truth. Contrary to the Respondent's contention, it was not incumbent on the Union at the time it filed its charge to "have at least probable cause based upon a prudent investigation." It is well established that the purpose of a charge is "to set in motion the machinery of an inquiry. The responsibility of making that inquiry . . . is one that Congress has imposed upon the Board, not the charging party.''8 Thus, the Union could properly call upon the Board to investigate the Union's goodfaith belief that the Respondent discriminated against union electricians in hiring at the smelter project; it was not required to accept the Respondent's denials as

We accordingly agree with the judge that the Respondent's state court lawsuit lacked a reasonable basis. We further agree with the judge, for the reasons stated by him, that the lawsuit was filed with a retaliatory motive. Accordingly, the judge correctly concluded under the test in *Bill Johnson's*, supra, that the Respondent unlawfully initiated and maintained the state court lawsuit against the Union and Burke.⁹

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, LP Enterprises, Billings, Montana, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.

⁴The judge cited, inter alia, the following factors: (1) at no time did the Respondent tell Burke that the Respondent did not have the contract to hire electricians at the smelter project; (2) the Respondent's newspaper advertisement did not specify what construction trades were being recruited; (3) the Respondent did not refuse the employment application of Burke and the three other union applicants even though they made clear on their application that they were seeking employment as electricians; (4) the Respondent referred Burke to its superintendent at the smelter, LaFournaise, who took a second employment application from Burke when Burke visited the smelter site; and (5) LaFournaise telephoned Burke to ask him if he was satisfied that the Respondent had his employment application and was servicing him properly.

⁵Contrary to the judge, we do not require the Respondent to meet a burden of demonstrating that the charge was filed in bad faith. Rather, the burden was on the General Counsel to show that the state court lawsuit lacked a reasonable basis and was filed for a retaliatory motive. In this case, the General Counsel has met its burden of proving that the lawsuit lacked a reasonable basis by showing that the Union did not file the unfair labor practice charge in bad faith.

⁶For example, of 33,833 unfair labor practice charges filed with the Board in fiscal year 1990, 30.3 percent were withdrawn before complaint and 34.8 percent were administratively dismissed. 55 NLRB Ann. Rep. 6 (1990).

⁷The Respondent points to the following evidence: (1) that Respondent's president, Post, told Burke that she seldom had calls for electricians; (2) that Respondent's superintendent, LaFournaise, told Burke that the Respondent did not have the contract to hire electricians at the smelter project; and (3) that Respondent's office manager, Staker, told Burke in their third telephone conversation that Respondent was not doing the electrical work at the smelter project. In considering the Respondent's evidence, we have not relied on the judge's finding that there was a close working relationship between LaFournaise and Richard Lamm at the smelter project.

⁸NLRB v. Fant Milling Co., 360 U.S. 301, 307 (1959).

⁹We find it unnecessary to pass on the judge's finding that the Respondent's Montana state court lawsuit is not preempted, because the General Counsel did not allege or litigate the issue of preemption

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT initiate or maintain a baseless lawsuit against the Union or its officials in retaliation for their protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL withdraw our lawsuit for malicious prosecution (90–1068) filed in the Yellowstone County Court in Montana against Donald Burke and the Union and reimburse them for all legal expenses incurred in the defense of the lawsuit.

LP ENTERPRISES

Michael T. Pennington, Esq. and Jeffrey L. Horowitz, Esq., for the General Counsel.

Jerome L. Froimson, Esq., of Phoenix, Arizona, for the Respondent.

Walter C. Brauer III, Esq., of Denver, Colorado, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL D. STEVENSON, Administrative Law Judge. This case was tried before me at Billings, Montana, on May 27 and 28, 1992, pursuant to a complaint issued by the Regional Director for the National Labor Relations Board for Region 27 on August 15, 1991, and which is based on a charge filed by International Brotherhood of Electrical Workers, Local 532 (the Union) on October 31. The complaint alleges that LP Enterprises (Respondent) has engaged in certain violations of Section 8(a)(1) and (4)² of the National Labor Relations Act (the Act).

Principal Issues

- (1) Is the state court lawsuit filed by the Respondent against the Union and one of its officials preempted by the Act?
- (2) Does the state court lawsuit in issue have a reasonable basis in fact or law?

(3) Was the state court lawsuit filed for retaliatory reasons?

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and to cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of General Counsel, Charging Party Union, and Respondent.

On the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

Respondent admits that it is a Montana corporation (Tr. 308) engaged in the business of labor contracting providing labor, supervision, and payroll services to other businesses and having an office located in Billings, Montana. Respondent further admits that in the course and conduct of its business operations, it has annually provided more than \$50,000 in services to customers located outside the State of Montana. Accordingly, it admits, and I find, that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that International Brother-hood of Electrical Workers, Local 532 is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICE

A. The Facts3

1.

On June 13, Ron Burke, assistant business manager of the Union, acting on behalf of the Union, filed an unfair labor practice charge against Respondent, alleging as the basis:

In response to a newspaper ad for construction workers, Dave Michaels, Ron Burke, Ron Pering, and Dale Loucks applied for a job. L. P. Enterprises under contract with Stillwater Mining Company is the sole hiring agency for the project. Numerous applicants have been referred out as the project nears completion.

Not one of these individuals listed above has been contacted for the project due to their union affiliation. [G.C. Exh. 4.]

Subsequent to the processing and investigation of the charge (G.C. Exh. 4), it was found to be without merit. Given a choice of having his charge dismissed or withdrawing same, Burke elected the latter course.

On October 2, Linda Post, president and owner of Respondent, acting on behalf of Respondent, filed a lawsuit in the 13th Judicial District Court of Yellowstone County, Montana, against the Union, and Ron Burke, alleging that Respondent incurred certain financial damages as a result of the Union's malicious prosecution of an unfair labor practice which the Union knew at the time it was filed was false and lacking a basis in law.

¹ All dates herein refer to 1990 unless otherwise indicated.

² On July 31, 1991, the Region by letter informed the Union's attorney that it would not include in the complaint an 8(a)(4) allegation charging that the state court lawsuit against the Union violated Sec. 8(a)(4) of the Act. This left intact the 8(a)(1) allegations based on the Respondent's lawsuit against Burke and the Union, and an 8(a)(4) violation based on Respondent's lawsuit against Burke (G.C. Exh. 1(c)). Apparently, the Union did not appeal this decision.

 $^{^3\,\}rm Throughout$ the transcript, where applicable, change my title from ''Hearing Officer'' to ''Administrative Law Judge.''

As noted above, upon receipt of service of the state court complaint and summons, the Union filed a second unfair labor practice charge based on the filing of the state court lawsuit. This time, after investigation, the charge was found to contain merit. A complaint subsequently issued and the instant hearing held. Both Burke and Post testified for their respective sides. Other witnesses also testified and will be noted below. Meanwhile, the state court lawsuit has been stayed pending resolution of the instant case.

These then are the basic facts. To expand on the basic facts as appropriate, I turn back to the record.

2.

Since 1986 when it came into existence, Respondent has had a continuing contract with the Stillwater Mine located near Columbia, Montana, for the recruitment and furnishing of certain construction trades employees on a temporary, asneeded basis. Respondent provides the same services for other clients located in Montana, Arizona, and elsewhere in the Western United States. The individuals furnished to any of Respondent's clients are considered to be Respondent's employees; as such, they are trained in appropriate safety measures, covered by Respondent's workmen's compensation and supervised and paid by Respondent's foremen and managers. The jobs last for varying amounts of time and in some cases require employee relocation. According to Post, she does not normally hire Montana electricians for jobs in that State. However, she has furnished electricians on a job in Arizona where a majority of the electricians desired to work on a union job. Accordingly, all electricians furnished by Respondent for the Arizona job have joined the IBEW local there. Post and that local apparently have maintained a good working relationship for some time.

In early 1990, an outside consultant named Thomas retained by Stillwater notified Post that a smelter project was to be built at the mine, and that her continuing contract with Stillwater was to be supplemented and amended for Respondent to supply the necessary construction tradespersons who were to be employed on the project.

Accordingly, Post caused a newspaper ad to be placed in the local newspaper. It reads as follows:

CONSTRUCTION WORKERS LP Enterprises will be taking applications Monday Feb. 12, 10am–4pm at Columbus MT, Super 8, room 104 for 2–3 months fast-track construction project in Columbus MT. Apply in person only. [G.C. Exh. 2.]

Upon arrival at the motel named in the ad, Post found approximately 150 persons seeking employment. Addressing 20 applicants at a time in a conference room, Post distributed applications and pencils and stated that she was not yet certain what trades would be involved in the smelter project, but anyone not selected for that job would have his or her application kept on file for future jobs.

Among those submitting an application on that day was Burke, at all times material to this case, a full-time, paid union organizer and assistant business agent, who was seeking employment for the purpose of organizing nonunion electricians. From the same IBEW local were three other unemployed applicants who, while not paid union organizers, were

strong union supporters and potential union organizers if they had been hired.

When Burke submitted his application (G.C. Exh. 3) to Post, there is some conflict as to what was said. According to Burke, Post looked over the application, thanked him and promised a call "this week." According to Post, Burke asked about electrician jobs on the project, but Post allegedly replied that she seldom had calls for electricians, except for a project in Arizona where he'd have to join the union to work.

Of the three other persons who submitted applications for electricians work in response to the newspaper ad recited above, only one, Dale Loucks, testified. According to Loucks, he called the Union after reading the ad to try and get information on Respondent, but no one there knew any background on Respondent. Because Loucks was then unemployed, he decided to apply at the Motel 8. Upon arrival, he filled out his application, clearly indicating his qualification as a journeymen electrician and his desire to secure electricial work (G.C. Exh. 7). Two other journeymen electricians, Pering and Michaels rode to the Motel 8 with Burke. Like Burke, they filled out and submitted to Post applications for employment as electricians.

After Post received the applications at the Motel 8, she returned to her office where she paper screened the applications. Of the 150 submitted, she ultimately discarded or placed in a file drawer about 100 which were unacceptable for the smelter job. Disqualifying reasons included poor work records for Respondent in past jobs, lack of experience, or skills, or geographically undesirable. Post gave the 50 remaining applications to Phil LaFournaise, Respondent's onsite supervisor and timekeeper at the Stillwater Mine. Not currently employed by Respondent, LaFournaise testified as a Respondent witness.

It is not clear whether Burke's application or any of the three other electricians were among those tendered by Post to LaFournaise. The confusion is based on the fact that LaFournaise knew from the beginning that Respondent was not supplying or specifically recruiting electricians for the smelter job. The reason was due to Stillwater's decision to subcontract the electrical work to Respondent's witness, Richard (Dick) Lamm, d/b/a Electric West. Post, on the other hand, testified that she never concerned herself with whether or not Respondent would provide electricians to the smelter project. Furthermore, when Post gave her affidavit to the Board in March 1991, she claimed not to recall when she learned that Lamm was to be the electrical contractor at the smelter (Tr. 346).

All agree that neither Burke nor the other three electricians were interviewed or called for jobs at the smelter. They were, however, all offered other jobs by representatives of Respondent. More about this below.

Lamm and LaFournaise had a close working relationship at the smelter, sharing a phone with the same phone number. Each had office space in separate trailers furnished by Stillwater. Beginning his electrical work in February, and continuing for about 6 months, Lamm ultimately hired seven or eight electricians. All or most were recruited and hired by Lamm himself, who called various electrical suppliers requesting the names of suitable candidates for employment. Lamm also placed an ad in a local paper and contacted the state unemployment service for candidates. Pointedly, how-

ever, Lamm claimed never to have asked LaFournaise for electrician referrals from its files (Tr. 236). This testimony conflicts somewhat with that of LaFournaise who testified that Lamm had asked LaFournaise to direct any electricians who called to Lamm because he was seeking journeyman electricians (Tr. 269).

The evidence of other jobs offered to the electricians was provided in part by Respondent witness Betty Staker, Respondent's former employee between January and November 1991. Hired first as a secretary/receptionist, Staker was promoted to office manager after Respondent relocated its office from Bozeman to Billings, Montana, in April. According to Staker and confirmed by Loucks, in late March, Staker called Loucks on behalf of Respondent and offered Loucks a job out of the area where Loucks then lived. Due to certain domestic reasons involving a divorce, Loucks was then unable to leave the area. Staker then asked Loucks if he knew of any qualified electricians who might be interested in the job. Loucks reported this job offer to Burke at the Union.

Staker also credibly testified that in March, she called both Pering and Michaels to offer them jobs, other than at the smelter.⁴ Staker recalled that both declined the offer, Pering due to a traffic court restriction on where he could drive, and Michaels due to the fact that he already had a job. Staker even called Pering back to offer him an opportunity for relocation to another area, but he declined.

Burke too had contact with Staker on several occasions, prior to talking to Post. Both Burke and Staker agree that Burke called several times in March and April, attempting to reach Post, who was then out of town. There is some conflict as to whether Burke specifically told Staker initially that he was following up on his application for work at the smelter as an electrician. Eventually, however, the two witnesses agree that this was made clear to Staker who referred Burke to LaFournaise on site for further information.

Eventually, Burke reached Post at her office, apparently in May. Burke also went to the smelter project where he met LaFournaise for the first time and Lamm whom he knew as a nonunion electrical contractor who for some time Burke had been attempting to persuade to sign an agreement with the Union. Because the record is not definite as to whether Burke went to the smelter first or talked to Post first, I will assume the former. According to Burke, when he met LaFournaise, he asked for Lamm for the purpose of making his usual recruiting pitch and without knowing exactly what Lamm was doing at the smelter. Then LaFournaise asked Burke if he was a licensed electrician. When told Burke was, LaFournaise said, "Dick wants to talk to you! He needs electricians."

LaFournaise recalls the meeting differently. Burke walked into his trailer one day and asked if Respondent was hiring electricians. LaFournaise explained that another contractor was hiring electricians. When Burke inquired about his application, LaFournaise couldn't recall if he had it on file or not. So LaFournaise had Burke complete a second application for

Respondent to keep on file for future reference. Then LaFournaise directed Burke to Lamm. Before he left, Burke inquired about other jobs at the smelter and other wage scales Respondent had between 20 to 40 employees on site including laborers, welders, concrete carpenters, cement finishers, and masons. LaFournaise claimed that he gave Burke wage scales on two classifications and discussed generally wage scales for other jobs. Burke dismissed all of these as "too low" and said he was not interested.

Lamm recalled meeting Burke on the smelter job and being asked how things were going. Lamm responded that he was doing the electrical work on the project. Without indicating that he was looking for a job as an electrician, Burke told Lamm there was still time to think about going union and the Union could be very helpful in supplying the necessary manpower. This was a message Burke had conveyed to Lamm many times before, and Lamm too, responded as he had done in the past: he'd think about it.

Post recalled talking to Burke only one time, in May. By this time, LaFournaise had told her that Burke was employed by the Union, so she asked Burke if he didn't already have a full-time job. Burke said he did, but that he was seeking another job. Post replied that she didn't have any electrical jobs at the smelter, but if he were serious, she would hire him to do some electrical work for an addition to her home she was building. Burke said he wasn't interested.

A few days later, Burke and his boss Donald Herzog, business manager for the Union and Respondent's witness at hearing, called the business offices for the Stillwater Mine to ask if there were any jobs for electricians on the smelter project. A person named Debbie (last name and title unknown), told the two union officials that all hiring was being done by Respondent.

Burke recalls first talking to Post a month or more before May. Rather than a single call, Burke recalled several. He agrees that at one point she offered him work at her home which he declined. He also testified and Post did not dispute that during his telephone conversation with Post on one or more occasions, Post never said that Respondent didn't have the contract to furnish electricians to the smelter project.

Based on the fact that none of the four union electricians were hired by Respondent and other facts as reflected above, Burke filed the unfair labor practice charge on June 5 in Case 27–CA–11353 (G.C. Exh. 4).

3.

After the above-referenced case was withdrawn by Burke pursuant to the Region's request, Post contacted the Union's International representative, Ken Olson, Herzog's immediate superior. In August, Olson, Herzog, and Post met in Post's office at Post's request. Olson did not testify in this case, but there is little dispute over the substance of the meeting. Post stated the Union knew the charge had been false when filed and that she had incurred financial expenses in defending herself and Respondent. She demanded reimbursement. Herzog said that filing of the charge with the Board was just a tool we use. The Union refused to pay any reimbursement. The state court suit followed and the instant complaint came next.

⁴Respondent introduced the phone records of Respondent's business for March and April to confirm Staker's calls to Pering and Michaels (R. Exh. 2). In addition, their applications submitted to Post at Motel 8 were admitted into evidence (C.P. Exhs. 1 (Michaels), 2 (Pering)).

B. Analysis and Conclusions

1. The preemption issue

The Union contends, brief at 12–13, that the state court suit filed by Respondent is preempted by the Act. If the Union is correct, in its threshold argument, it is also correct that the case of *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983) does not apply.⁵

In American Pacific Concrete Pipe Co., 292 NLRB 1261 (1989), the Board found that its jurisdiction to decide backpay claims preempted the Respondent's suit pertaining to the same subject matter. In support of its conclusion, the Board noted, at 1261–1262, the decision of Building Trades Council of San Diego v. Garmon, 359 U.S. 236, 244–245 (1959), where the Court held:

When an activity is arguably subject to Sec. 7 or Sec. 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.

The Board went on to note, at 1262, the basis for its conclusion that the *Bill Johnson's Restaurants*, case would not apply, quoting the Court's decision, 461 U.S. at 737 fn. 5:

It should be kept in mind that what is involved here is an employer's lawsuit that the federal law would not bar except for its allegedly retaliatory motivation. We are not dealing with a suit that is claimed to be beyond the jurisdiction of the state courts because of federallaw preemption, or a suit that has an objective that is illegal under federal law. Petitioner concedes that the Board may enjoin these latter types of suits. . . . Nor could it be successfully argued otherwise, for we have upheld Board orders enjoining unions from prosecuting court suits for enforcement of fines that could not lawfully be imposed under the Act . . . and this Court has concluded that, at the Board's request, a District Court may enjoin enforcement of a state-court injunction "where [the Board's] federal power pre-empts the field." NLRB v. Nash-Finch Co., 404 U.S. 138, 144 (1971).

The case of *Bill Johnson's Restaurants*, supra, 461 U.S. at 741–742, itself deals in part with the preemption issue:

Moreover, in recognition of the States' compelling interest in the maintenance of domestic peace, the Court has construed the Act as not preempting the States from providing a civil remedy for conduct touching interests "deeply rooted in local feeling and responsibility." San Diego Building Trades Council v. Garmon, 359 U.S. 236, 244 (1959). It has therefore repeatedly been held

that an employer has the right to seek local judicial protection from tortuous conduct during a labor dispute. [Citations omitted.]

In Linn v. Plant Guard Workers, supra, at 65, we held that an employer can properly recover damages in a tort action arising out of a labor dispute if it can prove malice and actual injury. See also Farmer v. Carpenters, supra, at 306. If the Board is allowed to enjoin the prosecution of a well-grounded state lawsuit, it necessarily follows that any state plaintiff subject to such an injunction will be totally deprived of a remedy for an actual injury, since the "Board can award no damages, impose no penalty, or give any other relief" to the plaintiff. Linn, supra, at 63. Thus, to the extent the Board asserts the right to declare the filing of a meritorious suit to be a violation of the Act, it runs headlong into the basic rationale of Linn, Farmer, and other cases in which we declined to infer a congressional intent to ignore the substantial State interest "in protecting the health and well-being of its citizens." Farmer, supra, at 302-303. See also Sears, Roebuck & Co. v. Carpenters, supra, at 196; Linn, supra, at 61.

The filing of unfair labor practice charges with the Board is generally a protected activity. *Summitville Tiles*, 300 NLRB 64, 65 (1990). However, where, as here, the conduct at issue under state law (i.e., the alleged malicious filing of an unfair labor practice charge) is arguably prohibited by the Act, the Court has refined the *Garmon* preemption test:

The critical inquiry is not whether the State is enforcing a law relating specifically to labor relations or one of general application but whether the controversy presented to the state court is identical to . . . or different from . . . that which could have been, but was not, presented to the Labor Board. For it is only in the former situation that a state court's exercise of jurisdiction necessarily involves a risk of interference with the unfair labor practice jurisdiction of the Board which the arguably prohibited branch of the *Garmon* doctrine was designed to avoid.

Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180, 197 (1978).

Thus I am instructed to look at the "controversy" presented by Respondent's state court suit against the Union and Burke and ask whether the Board could have adjudicated it instead. The Board has no means of adjudicating the alleged malicious prosecution issue contained within the state court suit. I conclude therefore, there is no preemption of this case. See *Windfield v. Groen Division*, 890 F.2d 764, 768–70 (5th Cir. 1989); cf. *Belknap v. Hale*, 463 U.S. 491 (1983).

Although the instant case is not subject to the doctrine of preemption, it is subject to the analysis of *Bill Johnson's Restaurants*, supra. I turn to that case to decide whether the Board may enjoin Respondent from prosecuting "a baseless lawsuit with the intent of retaliating against an employee for the exercise of rights protected by Sec. 7 of the NLRA." 461 U.S. at 744.

⁵I note that the General Counsel did not allege in the complaint nor does he now argue in his brief that preemption applies to this case. In *Kimtruss Corp.*, 305 NLRB 710, 711 (1991), the Board held, "It is settled that a charging party cannot enlarge upon or change the General Counsel's theory." This rule does not apply here since the issue is Board jurisdiction which can be raised by any party at any time. Cf. *Clark Concrete Construction Corp.*, 116 NLRB 321 fn. 3 (1956).

2. *Bill Johnson's Restaurants* doctrine applied to the present case

a. Preliminary statements of law

Before proceeding to the central issue in this segment of my decision, I recite some basic and familiar legal principles which will serve as a framework for further analysis. First, any person for any reason may file charges with the Board. Stationary Engineers Local 39 (Kaiser Foundation Hospitals), 268 NLRB 115 (1983). The purpose for this broad rule is to permit the widest possible public access to the Board's processes. Next, I find that Burke, though he sought employment with Respondent, in order to organize nonunion electricians, and while he was himself a paid union organizer, was an "employee" under the Act. See Willmar Electric Service v. NLRB, 968 F.2d 1327 (D.C. Cir. 1992); Escada (USA) Inc., 304 NLRB 845 (1992), but see H. B. Zachry Co. v. NLRB, 886 F.2d 70 (4th Cir. 1989).

While access to the Board's processes is an important policy consideration, no less important is access to the courts for redress of alleged wrongs. In order to strike the proper balance between the two policies which are in potential conflict in this case, I turn to the case of *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, an authority recognized and cited by all parties to this proceeding. In that case, the Court held that in order to enjoin the prosecution of a state court lawsuit, the General Counsel must establish a retaliatory motive and a lack of reasonable basis in fact or law. If the suit has a reasonable basis, the Board must stay its unfair labor practice proceeding until the state court suit has concluded. See *Machinists Lodge 91 (United Technologies)*, 298 NLRB 325, 326 (1990), enfd. 934 F.2d 1288 (2d Cir. 1991).

For guidance on the proper procedure in making a *Bill Johnson's Restaurants* analysis, I turn to the Board's decision in *Giant Food Stores*, 295 NLRB 330, 333 (1989), where the Board stated as follows:

The Court further indicated that when confronted with an allegation that the filing and prosecution of a lawsuit violates the Act, the Board first must determine whether the suit has a "reasonable basis." If it is found that the suit lacks a reasonable basis, the Board may then proceed with the unfair labor practice proceeding and determine whether the suit was filed with a retaliatory motive. Should the Board determine that the suit has a reasonable basis, however, then the Board may not enjoin the suit, but must stay its unfair labor practice proceeding until the state court suit has been concluded.

See also Johnson & Hardin Co., 305 NLRB 690 (1991).

b. Reasonable basis inquiry (in fact or law)

In *Teamsters Local 776 v. Rite Aid*, 973 F.2d 230 (3d Cir. 1992), the court enforced the Board's decision involving a *Bill Johnson's Restaurants*, issue, and noted, at 235

[T]he Court [in Bill Johnson's Restaurants,] also concluded that it would reach a different result if the suit was based on an insubstantial claim, i.e., one that did not have a reasonable basis. The Court indicated that a suit could not be viewed as not having a reasonable basis if there was a dispute over a genuine issue of ma-

terial fact or, even if the facts were not disputed, there was a realistic chance that the plaintiff's legal theory might be adopted by the state court. In that event, the Board was obliged to allow the lawsuit to proceed. Ultimately, however, if the plaintiff did not prevail in the lawsuit, the Board might conclude that the suit had been filed in retaliation for the employees' exercise of Section 7 rights and the Board could therefore assess after-the-fact relief of attorney's fees and other expenses against the plaintiff. The Court's reluctance to allow a prior restraint coupled with its recognition that later relief might be appropriate is a natural borrowing of principles regarding restrictions on freedom of speech.

In Summitville Tiles, supra, a case in certain respects similar to that pending at bar,⁶ Respondent filed a state court lawsuit alleging a count of malicious prosecution against Respondent's employees for filing of three unfair labor practices, two of which were later withdrawn. At footnoot 5 of the decision, the Board stated "the Company has not satisfied its burden of showing that the filing of the unfair labor practice charges and the employees' [subsequent] state court lawsuit were undertaken in bad faith and therefore did not constitute activities protected by the Act."

Based on the above authorities, I note that the Board instructs me to focus on a probable cause, good-faith standard for the filing of the initial unfair labor practice charge by Burke. With a different emphasis the circuit court interprets *Bill Johnson's Restaurants*, to require a determination of whether there is a dispute over a material fact based on a review of the entire record. Taking either or both paths in this case leads one to the same destination.

(1) Did Respondent meet its burden of showing that Burke filed an unfair labor practice charge in bad faith?

To answer the question framed in (1) above, I turn to the popular jargon of the day and ask, before Burke filed the initial unfair labor practice against Respondent, what did Burke know and when did he know it. Based on the facts, recited above and the record as a whole, I find the following.

At the time Post caused the want ad to be published, the affected area of Montana had high unemployment in the construction trades. The ad was nonspecific as to the trades being recruited, so it was reasonable for Burke and at least three other electricians to submit their applications. After reviewing the applications of the electricians at the Motel conference room, Post did not refuse the applications from any of the four. At no time did Post tell Burke or any other union official that Respondent did not have the contract to hire electricians at the Stillwater Mine. Neither did Staker or LaFournaise tell Burke that Respondent did not have the contract to hire electricians. In fact, the persons named above all acted in a way reasonably calculated to convey to Burke that Respondent was hiring electricians. For example, Staker referred Burke to LaFournaise at the site. LaFournaise took a second application from Burke. Then Post implied to Burke

⁶There is one important distinction between *Summitville Tiles*, and the instant case. In the former case, the company's lawsuit was no longer pending in state court because the company had not prevailed. 300 NLRB 65.

in May that his current full-time position (with the Union) was a factor in his not being hired.

To understand Respondent's strategy in taking applications from the four electricians in this case, I look first to the testimony of Respondent's former supervisor, LaFournaise:

One of the things LP does is take applications from anyone, only to provide a larger file for future reference. So whoever wishes to file an application, they are never refused [Tr. 294].

Post also gave relevant testimony in this respect:

I do not generally do electrical I have never done any electrical construction for the Stillwater Mine. I wasn't expecting to do any electrical work for the Stillwater Mine. [But] I never know what they're going to call and ask me for. [Tr. 337.]

That Post was using a nonspecific want ad to solicit and assemble a file of applications from out-of-work electricians for future reference is a strategy which need not be judged here. Burke, of course, was not privy to Respondent's inarticulated strategy. Based on the evidence, Burke reasonably believed that jobs for electricians were available at the smelter plant and that he was not selected due to his union affiliation. In this regard, I view LaFournaise's phone call to Burke at the union office as significant in judging Burke's good faith. According to LaFournaise, he called Burke to ask him if he was satisfied that Respondent had his application and that it was servicing him properly (Tr. 301). Burke reasonably interpreted the call as part of Respondent's tactics not to hire union applicants.

In assessing the overall information available to Burke and his superior, Herzog I view the two phone calls to the Stillwater Mine where they asked a partially unidentified person about employment of electricians at the smelter as of some value in the calculus. Herzog and Burke were referred to Respondent.

In light of the above information available to Burke, the question next becomes whether the offering of other jobs to the four electricians renders the filing of the unfair labor practice charge tainted by bad faith. I find the jobs offered by Respondent's representatives of little benefit to Respondent. Jobs at Post's home or outside the area were less desirable than jobs at the smelter project, only about 30 miles from Billings. To be sure, Burke was aware of the tendered jobs, but I find this knowledge insufficient to meet Respondent's burden to show bad faith by Burke.

Finally, I consider Burke's visit to the site, where he spoke to Lamm, Lamm told Burke he was doing the electrical work. However, in light of Burke's prior relationship with Lamm, a nonunion electrical contractor, Burke was not required to take this statement at face value. Moreover, Lamm never stated he had the contract to perform all the electrical work on the smelter project. Even if Burke credited entirely the statement made to him by Lamm, there was no way for Burke to know the business relationship, if any, between Respondent and Lamm's company, Electric West. In light of all other evidence available to Burke, I find it was part of his job to give the Union the benefit of the doubt, file the charges, and allow the Board to make its investigation.

In finding that Respondent has failed to carry its burden, I note that the Board has consistently held that it is unnecessary to prove the existence of available jobs at the time when unlawful discrimination on the basis of union membership occurs. Cf. *Utility & Industrial Construction Co.*, 214 NLRB 1053 (1974); *NLRB v. Lummus & Industrial Co.*, 210 F.2d 377, 381 (5th Cir. 1954).

(2) Is there a dispute over a genuine issue of material fact?

I find no such dispute exists. Even crediting all or most evidence offered by Respondent, as I have done above, I find that Burke had a sufficient basis to file the unfair labor practice. Certain conflicts in this record over exact contents of or numbers of conversations between Burke and Post, for example, are of no significance with respect to the central issue.⁷

Based on my discussion above, I find that Respondent's state court lawsuit lacked a reasonable factual basis. In light of this conclusion, I further find it is unnecessary to examine Montana law to ascertain whether Respondent is legally precluded from proving malicious prosecution under the facts presented to me.

c. Retaliatory motive

I find that Respondent filed its lawsuit with a retaliatory motive. In support of this conclusion, I note the testimony of Post on direct examination:

Q. [H]ow did you feel that this lawsuit that you had me file would help you in that respect, in terms of your reputation in terms of labor and so forth?

A. Well, I didn't want them—I felt that they would keep coming after me unless I said, "Look, you did this, it was wrong, I want my attorneys fees, I want my costs. It cost me a considerable amount of time just in staff people, as well as attorneys' fees." [Tr. 334.]

When Post spoke to Burke in May, she had been told by LaFournaise that Burke was working full time for the Union, so she knew who he was. She told him that she had no openings at the smelter (for electricians) and then added, "Don't you have a full-time job?" (Tr. 325.)

Still other relevant background concerns Post's account of alleged "repercussions" caused by the filing of the unfair labor practice charge. According to Post, when it came time for her contract renewal with the Stillwater Mine, she was thoroughly questioned about what kind of labor relations problems she was having with the Union (Tr. 334). In light of Post's testimony quoted above, it is clear to me that Respondent had a retaliatory motive in filing its suit in state court. As further proof, I note that the Board has held that a punitive damage claim as Respondent seeks in its state court complaint (G.C. Exh. 6, p. 4) may indicate a retaliatory motive. American Pacific Concrete Pipe Co., supra, 292 NLRB at 1262; Summitville Tiles, supra, 300 NLRB at 65.

⁷ It is also unnecessary to evaluate here the alleged impeaching information offered by the Union with respect to certain legal problems experienced in Federal court by Post and a prior company she owned.

CONCLUSIONS OF LAW

- 1. The state court lawsuit filed by Respondent has not been preempted by the Act.
- 2. By filing and maintaining a state civil action for malicious prosecution against Donald Burke and the Union, International Brotherhood of Electrical Workers, Local 532, Respondent violated Section 8(a)(1) and (4) of the Act.

REMEDY

On concluding that Respondent has engaged in certain unfair labor practices, I will recommend to the Board that it be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent LP Enterprises filed against Donald Burke and International Brotherhood of Electrical Workers, Local 532 a baseless lawsuit in the 13th Judicial District Court, Yellowstone County, Montana (90-1068) alleging malicious prosecution in filing a false and fraudulent unfair labor practice charge with the National Labor Relations Board, which charge had no basis in law or fact in retaliation for Burke's and the Union's protected concerted activities, I will recommend that Respondent LP Enterprises be ordered to cease and desist and to withdraw the lawsuit. In addition, I will further recommend that Respondent LP Enterprises be ordered to place Donald Burke and the Union in the position they would have been absent the violations of Section 8(a)(4) and (1), and to make them whole for all legal expenses they incurred in the defense of the lawsuit, plus interest as computed in New Horizons for the Retarded, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁸

ORDER

The Respondent, LP Enterprises, Billings, Montana, its officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Initiating or maintaining a baseless lawsuit against Donald Burke and the Union in retaliation for their protected concerted activities.
- (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Withdraw its lawsuit for malicious prosecution (90–1068) filed in the Yellowstone County Court in Montana against Donald Burke and the Union and reimburse them for all legal expenses incurred in the defense of the lawsuit, in the manner set forth in the remedy section of the decision.
- (b) Post at its place of business in Billings, Montana, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.
- (c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁹If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."